UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

PATRICK BRUCE GORDON,

Petitioner,

vs.

DANIEL VASQUEZ, et al.,

Respondents.

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CIV S-91-0882
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DEATH PENALTY CASE

FINDINGS AND RECOMMENDATIONS

Petitioner Patrick Bruce Gordon is confined at San Quentin state prison pursuant to a May 3, 1985, judgment of the Sacramento County Superior Court sentencing him to death. After an unsuccessful appeal, Gordon filed a habeas corpus petition in this court on July 5, 1991, and amended the petition on October 23, 1992.

On January 26, 1993, respondent moved to dismiss the amended petition filed October 23, 1992, upon the ground that it contained unexhausted claims. On May 4, 1993, the district court stayed this proceeding to allow petitioner to present his unexhausted claims to the state

court and granted petitioner "a 60-day stay of execution in which to seek a further stay from the state court."

Within the time allowed, petitioner obtained an order appointing counsel to represent him in state court. When, however, on April 28, 1993, the California Supreme Court denied petitioner's April 12, 1993, request for funds to investigate potential habeas issues, without seeking state habeas corpus relief, petitioner presented a request for investigative funds to this court pursuant to 21 U.S.C. S 848(q)(4)(B). On June 29, 1993, I denied petitioner's request.

Petitioner sought reconsideration of that order by the district judge and the parties stipulated to an order extending the extant stay of execution pending further order of the court.

On July 25, 1994, Judge Karlton found that section 848(q) authorized disbursement of funds for investigation of claims to be presented to the state court and remanded

the application to me for further proceedings in light of his decision.

Respondent then moved (1) to vacate the June 27, 1994, order staying execution of a sentence of death and (2) to stay execution of Judge Karlton's July 25, 1994, order.

In support of his request to vacate the extant stay of execution of sentence, respondent argues that this court lacks jurisdiction to stay the state court judgment. While there maybe a question about the appropriate length of such a stay, which respondent has not argued, the court's jurisdiction to stay execution of sentence to permit presentation of unexhausted claims to the state court cannot seriously be questioned. Neuschafer v. Whitley, 860 F.2d 1470, 1472 n. 1 (9th Cir. 1988), cert. denied, 493 U.S. 906 (1989). Accordingly, respondent's motion to vacate the stay of execution should be denied.

On or about September 15, 1994, respondent applied to the Ninth Circuit Court of Appeals for a writ requiring

Judge Karlton to vacate his July 25 order authorizing investigation funds. To preserve his right to appellate review, respondent seeks a stay of Judge Karlton's order.

To obtain the requested stay, respondent must show a probability of success before the court of appeals and the possibility of irreparable injury. Lopez v. Heckler, 713 F.2d 1432, 1435 (9th Cir. 1983). Respondent contends that his attack upon the order will probably succeed because the order conflicts with precedent construing section 848(q), conflicts with 28 U.S.C. § 2254, which requires dismissal of federal habeas petitions containing unexhausted claims, conflicts with the federal principles of abstention and comity, and is contrary to the plain meaning of section 848. Respondent contends that he will suffer irreparable injury because disbursement of any money pursuant to the order will moot the issue and deprive him of appellate review.

Petitioner argues that respondent has not shown probability of success merely by rehashing the same failed

arguments presented to this court and that his attack cannot succeed because he lacks standing to challenge an order giving federal habeas counsel access to federal funds. Petitioner also argues that respondent has demonstrated no cognizable injury while, on the other hand, suspending access to federal investigation funds will inevitably delay the state proceeding and threaten invocation of a state procedural bar for delay.

Respondent's application for a stay of the order authorizing federal investigation funds presents no argument that Judge Karlton has not previously carefully considered and rejected. Although the question may be one about which reasonable judges have differed, respondent has not shown a likelihood of success in the appellate court. In addition, apart from a perceived insult to the abstract principle of comity, respondent has shown no cognizable injury from an order financing petitioner's counsel's efforts to investigate facts in support of federal constitutional claims; indeed, comity assumes that the state

court shares this court's obligation to protect pertinent constitutional guarantees. Finally, the order sought by respondent is more likely to delay the ultimate resolution of petitioner's constitutional attack upon his conviction and death sentence, which is contrary to the paramount interests of all parties. Accordingly, respondent's request for a stay of Judge Karlton's July 25, 1994, order should be denied.

As mentioned at the outset, this proceeding was commenced on July 5, 1991, by filing a pro se petition alleging only that the petitioner's conviction violated his federal constitutional rights. Little productive to the identification and resolution of any federal claims has occurred since.

Almost seven months after counsel was appointed for petitioner, counsel requested funds to investigate claims. This request was denied and on August 21, 1992, I required petitioner by October 23, 1992, to amend his petition to set forth facts which, if found to be true, would

entitle petitioner to the relief requested. Under threat that failure to comply would result in my recommendation for summary dismissal of the petition, petitioner timely filed an amended petition setting forth numerous claims. This pleading only provoked a motion by respondent to dismiss the petition because some of the claims had never been presented to the California courts.

Recently, in McFarland v. Scott, 114 S.Ct. 2568, 129 L.Ed.2d 666 (1994), the Supreme Court observed that "[t]he services of investigators and other experts may be critical in the preapplication phase of a habeas corpus proceeding, when possible claims that their factual bases are researched and identified." This observation provokes reconsideration of my prior disapproval of funds to investigate federal claims.

McCleskey v. Zant, 499 U.S. 467, 111 S.Ct. 1454 (1991) requires a federal habeas corpus petitioner to include all federal claims in a single federal petition unless in a second proceeding petitioner can excuse prior failure

to include a claim by showing that petitioner did not possess or by reasonable means could not have obtained sufficient basis to allege a claim in the first petition through discovery, expansion of the record or an evidentiary hearing. 111 S.Ct. at 1472. In that case, petitioner was convicted in part upon the evidence of a jailhouse informant who occupied a cell next to McCleskey's and who testified that McCleskey admitted shooting a police officer during a robbery. The Court found that this information was sufficient to put McCleskey on notice of the necessity of investigating a Massiah claim in his first federal habeas petition. Of course, this decision assumes that the federal habeas petitioner has the means to conduct the appropriate investigation. The same assumption is implicit in Fed. R. Civ. P. 81(a)(2), which applies the civil rules of procedure to habeas corpus proceedings--Fed. R. Civ. P. 11 requiring habeas counsel to certify that all of the claims presented "have evidentiary support or, if specifically so identified,

are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." The McFarland decision removes any residual doubt about the matter. Federal habeas corpus counsel simply cannot avoid the pitfalls of McCleskey and comply with the obligations of Rule 11 unless given the opportunity to investigate potential habeas claims.

It is also fairly apparent that without the opportunity to conduct reasonable factual investigation, McCleskey virtually compels federal habeas counsel to file a petition containing any conceivable federal claim and that such a petition will invariably contain unexhausted claims. Upon filing such a petition, by virtue of Rose v. Lundy, 455 U.S. 509 (1982), "comity" then compels reference to the state court to allow it the first opportunity to consider the claims. The "new" claims are delivered stillborn because the state court, which has already undertaken appellate review and offered collateral review of the conviction, is bound by neither the mandate nor spirit of federal

procedural rules that allow a fresh federal inquiry. The process is sure if anything to produce delay, which the Supreme Court has recognized is fatal to the state's sovereign interest in the finality of its judgments, and hardly comports with any wise notion of "comity."

On the other hand, by allowing factual development in the federal proceeding, federal habeas counsel may find that there is inadequate factual support for a putative claim, omit it with reasonable professional confidence, and altogether avoid questions of "exhaustion." If there are facts to support a viable claim that ought to be presented in the first instance to the state court, "comity" is respected by presenting it a manner in which it may be expeditiously addressed. Thus, I conclude that the examination of a federal habeas corpus petition for unexhausted claims, required by Rose v. Lundy, supra, ought to be made only after federal habeas counsel has had fair opportunity to conduct a reasonable factual investigation.

Accordingly, I recommend that the order filed May 5, 1993, staying this proceeding to allow petitioner to present his claims to the state court be vacated and that petitioner's counsel be allowed within 30 days to present a new request for either discovery or § 848(q) investigation funds in this proceeding based upon an ex parte demonstration of some reason to believe that a federal claim deserves factual development a la McCleskey.[1/]

For all of the foregoing reasons, I therefore RECOMMEND that:

1. Respondent's motion to vacate this court's June 27, 1993, order staying execution of the state court's judgment sentencing petitioner to death be denied;

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1. It ought not be adequate simply to desire to explore a fresh defense, there being a strong presumption that petitioner's state court counsel met federal constitutional competency standards. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2054 (1984).

2. Respondent's motion to stay this court's July 25, 1994, order providing access to investigation funds pursuant to 21 U.S.C. § 848(q) be denied;

3. The amended petition filed October 23, 1992, be stricken without prejudice to refiling after adequate factual investigation upon the ground that petitioner was compelled to present it prematurely and without opportunity for adequate factual development;

4. The court's May 4, 1993, order staying this proceeding be vacated;

5. Petitioner be required within 30 days to present a new application for discovery or § 848(q) funds to develop federal claims that petitioner has reasonable notice may exist;

6. Having been allowed reasonable opportunity to investigate facts supporting federal claims, petitioner be allowed reasonable time to amend his petition;

7. If review of an amended petition alleging facts that, if proved, would entitled petitioner to relief, it appears

that any claim has not fairly been presented to the California court, petitioner be allowed opportunity to present such claims to the California court and that the court be allowed fair opportunity to consider such claims; and

8. This court thereafter proceed as promptly as may be possible to resolve federal claims properly put before this court.

These findings and recommendations are submitted to the Honorable Lawrence K. Karlton pursuant to 28 U.S.C. § 636(b)(1)(C). Any party may file written objections to these findings and recommendations pursuant to Fed. R. Civ. P. 72(b) and L.R. 304(b) within 10 days after service.

Date: October 14, 1994.

U.S. Magistrate Judge